Supreme Court, U.S.
FILED
MAR 25 2002
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ORIGINAL

No. 01-600

In The
Supreme Court of the United States

GERALD MASON, Warden,
Petitioner,

vs.

CHARLIE LEE MITCHELL,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY**

*** BRIEF IN OPPOSITION ***

PROOF OF SERVICE

SUBMITTED BY:
NORRIS J. THOMAS, JR. (P 21383)
Chief Deputy Director
(Counsel of Record)

MARLA R. McCOWAN (P 57218)
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645 Griswold Street
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_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, CHARLIE LEE MITCHELL, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

The Respondent's affidavit in support of this application is attached hereto.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

NORRIS J. THOMAS, JR. (P 21383)
Chief Deputy Director
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: March 25, 2002

IN THE
SUPREME COURT FOR THE UNITED STATES

CHARLIE LEE MITCHELL,

Petitioner,

-vs-

WARDEN GERALD MASON,

Respondent.

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL *IN FORMA PAUPERIS*

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot pre-pay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury that my answers on this form are true and correct. (28 U.S.C. §1746; 18 U.S.C. §1621.)

Signed: Charlie L. Mitchell Date: 03/21/02

Instructions:

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

My issue(s) on appeal is/are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months	Amount expected next month
Employment	$ 0	$ 0
Self-employment	$ 0	$ 0
Income from real property (such as rental income)	$	$ 0
Interest and dividends	$ 0	$ 0
Gifts	$ 0	$ 0
Alimony	$ 0	$ 0
Child Support	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0
Unemployment payments	$ 0	$ 0
Public assistance (such as welfare)	$ 0	$ 0
Other (specify):	$ 0	$ 0
Total monthly income:	$ 0	$ 0

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
N/A			

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or deductions.)

Employer	Address	Dates of employment	Gross monthly pay
N/A			

4. How much cash do you and your spouse have? $ None

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
None		$ 0	$ 0
		$	$
		$	$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

	Value	
Home	$	
Other real estate	$	Pontiac 1988 6000
Motor vehicle #1	$ 400	Make/year:_____model:_____reg.#_____
Motor vehicle #2	$	Make/year:_____model:_____reg.#_____
Other assets	$	
	$	
	$	
	$	

6. State every person, business or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
None	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ N/A	$ N/A
Are real-estate taxes included?	____ Yes ____ No	
Is property insurance included?	____ Yes ____ No	
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not included in motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____

Insurance (not deducted from wages or included in Mortgage payments	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor vehicle	$_____	$_____
Other:_____		
Taxes (not deducted from wages or included in Mortgage payments) (specify):_____	$_____	$_____
Installment payments	$_____	$_____
Motor vehicle	$_____	$_____
Credit card (name)_____	$_____	$_____
Department store _____	$_____	$_____
Other:_____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify)_____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months? _____ Yes ___✓___ No
If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? _____ Yes ___✓___ No
If yes, how much? $_____
If yes, state the attorney's name, address and telephone number:
_____

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? _____ Yes ___✓___ No
If yes, how much? $_____
If yes, state the person's name, address and telephone number:
_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal. Over the past year, I've been unemployed living with my mother whom is a retired worker from the National Bank of Detroit and I don't recieve any income from.

13. State the address of your legal residence.

Your daytime phone number: (313) 491-7557
Your age: 48 Your years of schooling: 12th grade
Your social security number: 386-54-4357

4069 Sturtevant, Det. Mich.
48204).1

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**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
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SUBMITTED BY:
NORRIS J. THOMAS, JR. (P 21383)
Chief Deputy Director
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Assistant Defender
State Appellate Defender Office of Michigan
645 Griswold Street
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REASONS FOR DENYING THE WRIT

There Are No Compelling Reasons to Review the Decision of the Sixth Circuit Court of Appeals.

A. RESPONDENT CHARLIE LEE MITCHELL HAS BEEN DISCHARGED FROM PRISON.

The instant petition for a writ of certiorari was submitted on October 9, 2001 and docketed on October 10, 2001 according to communications from this Court and Petitioner. Charlie Lee Mitchell, Respondent herein, was released from prison and fully discharged from his sentence for second-degree murder on October 5, 2001. This discharge came after Mr. Mitchell served nearly 13 years of a 10-15 year sentence for second-degree murder. Although his release from prison does not render the application moot, this Court should carefully consider whether a case or controversy still exists for either party, as required by Article III of the United States Constitution. *Spencer vs. Kemna*, 523 U.S. 1, 7 (1998) citing Art. III, §2, cl.1 (internal citations omitted). It is Respondent's position that Petitioner has not established the case or controversy requirement in light of the fact that Mr. Mitchell has been fully discharged from his sentence for the conviction that forms the basis of the instant application. *Spencer vs. Kemna*, *supra* at 7 (noting that "[o]nce the convict's sentence has expired . . . some concrete and continuing injury other than the now-ended incarceration or parole – some `collateral consequence' of the conviction – must exist if the suit is to be maintained.")

In the absence of this Court granting certiorari, Mr. Mitchell takes no position on his own ability to satisfy the case or controversy requirement.

B. THE SIXTH CIRCUIT'S DECISION TO GRANT RELIEF DID NOT APPLY A NEW RULE OF LAW.

Petitioner offers as its primary reason in support of certiorari that the Sixth Circuit's decision applied "a new rule of law" – holding that the pre-trial period is a critical stage of the

proceeding entitling one to the assistance of counsel. The Sixth Circuit granted relief to Mr. Mitchell, finding that he was denied counsel during the pre-trial period, where his attorney only met with him for several minutes prior to the start of trial. The Sixth Circuit found that prejudice was presumed from such a denial of counsel, pursuant to *Cronic vs. United States*, 466 U.S. 648 (1984).

Petitioner states that "this Court has never held that the `pre-trial period' is a `critical stage' of a criminal prosecution." Petition, at p. 13. Furthermore, Petitioner argues that the Sixth Circuit's reliance on "dicta" from *Cronic, supra,* was an improper basis for granting relief under the standards set forth in 28 U.S.C. §2254(d) and *Williams vs. Taylor*, 529 U.S. 362 (2000).

In its decision to grant relief, the Sixth Circuit stated that according to this Court, the period between appointment of counsel and the start of trial is a `critical stage' for Sixth Amendment purposes." *Mitchell vs. Mason*, 257 F.3d 554, 566-67 (6th Cir. 2001) citing *Powell vs. Alabama*, 287 U.S. 45 (1932)[1]; *Cronic*, *supra*; and *Moran vs. Burbine*, 475 U.S. 412 (1986). **This is clearly not a new rule of law.** To the contrary, the Sixth Circuit merely reaffirmed this Court's holding in *Powell* and subsequent decisions. Specifically, this Court's decision in *Maine vs. Moulton* is dispositive of Petitioner's concerns:

> "[T]he Court has also recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, `critical'

[1] Petitioner suggests that this Court disregard its holding in *Powell vs. Alabama*, 287 U.S. 45 (1932) inasmuch as the Sixth Amendment did not apply to the states until the 1963 decision of *Gideon vs. Wainwright*, 372 U.S. 335 (1963). Respondent, of course, recognizes that *Powell* is the law of the land and is an important decision in this Court's jurisprudence of our fundamental rights. *See generally*, *Duncan vs. Louisiana*, 391 U.S. 145, 179 (1968) ([T]he right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight amendments. The logically critical thing, however, was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental.") (J. Harlan, dissenting).

> stages in the criminal justice process `where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' . . . And, `[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . .'" *Maine vs. Moulton*, 474 U.S. 159, 170 (1985) (internal citations omitted) (emphasis added).

Furthermore, Petitioner's attempt to characterize the *per se* language in *Cronic*, *supra*, as dicta must also fail:

> "[T]he [Supreme] Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is *per se* reversible error. Six years before *Cronic*, the Court held in *Holloway vs. Arkansas* [435 U.S. 475, 489 (1978)] that `when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.' . . . Four years after *Cronic*, [in *Penson vs. Ohio*, 488 U.S. 75, 88 (1988)] the Court reiterated that harmless error analysis does not apply to Sixth Amendment claims involving the absence of counsel at a critical stage by stating that `the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" . . . As the Court most recently stated in a habeas case, `[t]he existence of [structural] defects – deprivation of the right to counsel, for example – requires automatic reversal of the conviction because they infect the entire trial process.' *Brecht vs. Abramson*, [507 U.S. 619, 629-30 (1993)]." *French vs. Jones*, -- F.3d --, 2002 W.L. 3600660 (6th Cir. (Mich) March 8, 2002).

For these reasons, the Sixth Circuit's analysis of established United States Supreme Court precedent was appropriate under the standards set forth in 28 U.S.C. §2254(d) and *Williams vs. Taylor*, *supra*.

C. THE STATE COURT'S DECISION TO DENY RELIEF WAS UNREASONABLE.

Petitioner's second point in requesting certiorari is that the Michigan Supreme Court's decision to deny relief was not an unreasonable application of *Strickland vs. Washington*, 466 U.S. 668 (1984) or *Cronic*, *supra*. The fundamental problem with the Michigan Supreme Court's analysis was that it decided the case in terms of inadequate preparation, due to counsel's

failure to meet with his client in any meaningful way prior to trial. The Sixth Circuit held that the Michigan Supreme Court's failure to recognize the pre-trial period as a "critical stage of the proceeding" was an unreasonable application of United States Supreme Court precedent. *See* section B, *supra*. Rather than applying established law set forth in *Powell vs. Alabama*, *supra*, and the cases that followed (holding that an accused defendant is entitled to be represented by an attorney during the pre-trial period), the Michigan Supreme Court denied petitioner's claim essentially stating that a criminal defendant is not entitled to a meaningful relationship with his attorney according to *Morris vs. Slappy*, 461 U.S. 1 (1983).

Stated simply, the Sixth Circuit correctly held that the Michigan Supreme Court missed the point. This is not a case about Mr. Mitchell not liking his attorney or the way his attorney prepared for trial. This is a case about Mr. Mitchell not having an attorney due to the fact that counsel did not consult with his client during the seven-month pre-trial period. This lack of contact was exacerbated by counsel's suspension from the practice of law for the immediate 30 days prior to trial. These facts clearly reveal that Mr. Mitchell was constructively denied counsel during the critical pre-trial period, and pursuant to *Cronic*, *supra*, *Holloway*, *supra*, *Penson*, *supra*, and *Brecht*, *supra*, the prejudice resulting therefrom is presumed. Thus, the problem with the Michigan Supreme Court's decision was its use of *Strickland's* two-pronged analysis which required Mr. Mitchell to establish prejudice. For that reason, the Michigan Supreme Court's decision is an unreasonable application of United States Supreme Court precedent of *Cronic*, *supra*, *Holloway*, *supra*, *Penson*, *supra*, and *Brecht*, *supra* and certiorari must be denied.

D. THERE ARE NO OTHER REASONS FOR GRANTING THE WRIT.

Despite Petitioner's characterization of this case as an "interesting vehicle" for this Court's time and resources, there is no real compelling reason to review the merits of this case

again. Both the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit arrived at the conclusion that Mr. Mitchell was denied counsel during the critical pre-trial proceedings and that prejudice was presumed from the denial of this constitutional right. The Sixth Circuit's decision did not create a new rule of law, as discussed in section B, supra. The cases that Petitioner cites in support of its position that a conflict in the law exists regarding exactly what type of factual situation would constitute a denial of counsel would be better addressed by those that present close questions. Here, Mr. Mitchell was clearly not afforded representation until the day his trial began. The facts of this case could not possibly reveal otherwise, and the Sixth Circuit correctly decided that habeas relief was warranted under 28 U.S.C. §2254(d) and *Williams vs. Taylor, supra*.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

NORRIS J. THOMAS, JR. (P 21383)
Chief Deputy Director
Counsel of Record

MARLA R. McCOWAN (P 57218)
Assistant Defender

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_____/

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Marla R. McCowan, being first duly sworn, deposes and says that on March 25, 2002, she mailed one copy of the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

via U. S. Mail to:
Jeffrey Caminsky (P 27258)
Principal Attorney, Appeals
12th Floor, 1441 St. Antoine Street
Detroit, Michigan 48226

MARLA R. McCOWAN

Subscribed and sworn to before me
March 25, 2002
Susan M. Meinberg
Notary Public, Oakland acting in Wayne County, Michigan
My commission expires: 02/13/04
IDEN #13033 - MARLA R. MCCOWAN for REB